No. 91-1200

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE CITY OF CINCINNATI,
Petitioner,
v.
DISCOVERY NETWORK, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the First Amendment creates a right to distribute commercial handbills through racks and boxes placed on public property.

2. Whether the City of Cincinnati must allow the distribution of commercial handbills through racks or boxes placed on public property because it permits newspapers to be distributed through sidewalk vending machines.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments. This case, yet another example of the ingenuity of counsel in fashioning constitutional challenges to a city's ordinary exercise of its police power, raises issues whose resolution will have a direct and substantial impact on *amici* and their members.

The court of appeals struck down a Cincinnati ordinance prohibiting the distribution of commercial handbills from dispensing boxes and racks placed on public property. In its decision, the court departed significantly from this Court's well-established approach for deciding First Amendment challenges to regulations of commercial speech. Specifically, the court:

1) failed to recognize that a state or local government has power to preserve public property for the uses to which it is lawfully dedicated and that the First Amendment does not require state or local government to cede possession of public property so that businesses may advertise as they choose;

2) reached the unprecedented conclusion that commercial speech is entitled to the same measure of First Amendment protection as any other speech, unless the regulation at issue is related to regulating either the commerce that the advertisement is promoting or the "distinctive effects" of that commerce; and

3) second-guessed the legislative determination underlying Cincinnati's regulation and expressly stated that no deference was due a city's decision in "close cases."

These errors threaten to upset time-honored standards by which state and local governments regulate commercial speech on public property. The court's decision imposes significantly higher burdens on state and local governments seeking to regulate commercial speech. It suggests that only uniform regulation of commercial speech and other speech can satisfy the First Amendment. It subjects governmental decisions

to judicial second-guessing if a court believes it can achieve a closer fit between a substantial governmental interest and the means chosen to promote that interest.

Unless corrected by this Court, the erroneous analysis of the court of appeals may result in numerous challenges to heretofore unquestioned regulations. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

A. Cincinnati's Commercial Handbill Ordinance

Cincinnati prohibits the distribution of "commercial handbills" on "any sidewalk, street or other public place within the city." Cincinnati Municipal Code § 714-23. Pet. App. 3a, 20a. A "commercial handbill" is defined to include "any printed or written matter . . . which advertises for sale any merchandise, product, commodity or thing . . . ." Cincinnati Municipal Code § 701-1-C (reproduced in Pet. App. 3a n.2, 20a). Another Cincinnati ordinance, however, expressly authorizes the distribution of "newspapers of general circulation in the city" from public racks or other structures on city sidewalks, "in accordance with rules and regulations promulgated by the city manager relating to the safety and unobstructed use of the streets by vehicular and pedestrian traffic." Cincinnati Municipal Code § 911-17. Pet. App. 20a.

B. Respondents' Distribution Of Commercial Handbills From Dispensing Devices on City Sidewalks

Respondents Discovery Network, Inc. and Harmon Publishing Co. are for-profit corporations that ad-

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

vertise their services through commercial magazines that they publish and distribute free of charge. Discovery's magazine, which is published nine times per year, advertises "non-credit educational, recreational and social programs" that the corporation offers for a fee to persons in the greater Cincinnati area. Harmon's magazine, entitled "Home Magazine," advertises real estate in various locations throughout the United States, including residential properties in the greater Cincinnati area. Pet. App. 2a, 19a.

Beginning in 1989, Discovery and Harmon distributed some of their commercial magazines through metal or plastic dispensing devices placed on the public sidewalk at various locations within the city of Cincinnati. Together, Discovery and Harmon placed some sixty-two such devices on the sidewalks of the city. The devices were by no means the principal method through which Discovery and Harmon distributed their advertisements. Only fifteen percent of Harmon's magazines and approximately one-third of Discovery's magazines were distributed through the dispensing boxes. Pet. App. 13a.

In February 1990, the Cincinnati city council passed a motion requiring the Department of Public Works to enforce the existing ordinance prohibiting the distribution of commercial handbills on public property. Pet. App. 3a. During the following month, the City notified Discovery and Harmon that their magazines were "commercial handbills" within the meaning of the ordinance and that their dispensing devices therefore should be removed from the public sidewalks. *Id.* at 21a. Respondents were afforded administrative hearings on the City's order, and the order to

remove the dispensing devices was upheld. *Id.* at 21a-22a.

C. Respondents' Challenge To The Cincinnati Ordinance

In June 1990, respondents filed this action in the United States District Court for the Southern District of Ohio. Proceeding under 42 U.S.C. § 1983, they alleged that Cincinnati's prohibition against the distribution of commercial handbills on public property violated the First Amendment. They complained, among other things, that Cincinnati could not lawfully permit newspaper vending machines and at the same time ban similar dispensing devices for commercial handbills. Cincinnati agreed to allow respondents' dispensing devices to remain on the public sidewalks while the litigation was pending. Pet. App. 22a.

D. The District Court's Decision

Following an evidentiary hearing, the district court ruled that respondents' magazines constitute commercial speech. Pet. App. 22a. The court also ruled that "[n]either publication contains noncommercial speech that is inextricably intertwined with the commercial speech." *Id.* at 22a-23a.

The court acknowledged that the City "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way." Pet. App. 23a. Nevertheless, the court decided that Cincinnati's ordinance "is an excessive means by which to accomplish the governmental objectives of safety and aesthetic appeal." *Id.* at 23a-24a. Declaring that there is no "reasonable fit" between the City's ends and the means chosen to accomplish those ends, the court held the ordinance invalid under the First Amendment.

E. The Court Of Appeals' Decision

The court of appeals affirmed. The court based its decision on two highly dubious propositions. First, the court announced that " 'commercial speech' only receives lesser first amendment protection when the governmental interest asserted is either related to regulating the commerce the 'commercial speech' is promoting, or related to any distinctive effects such commercial activity would produce . . . ." Pet. App. 2a. Starting from this premise, the court concluded that respondents' advertising had a "high value," *id.* at 13a, and that Cincinnati's ordinance does not "prescribe a 'reasonable fit' between the ends asserted and the means chosen to advance them." *Id.* at 7a, 13a-14a. Second, the court held that the ordinance cannot be justified as a proper "time, place, or manner" restriction on respondents' speech. Because the ordinance distinguishes between commercial speech and noncommercial speech, the court said, it is not "content-neutral," and it therefore cannot be justified as a reasonable time, place, or manner regulation.

SUMMARY OF ARGUMENT

I.

State and local governments are not obliged to dedicate public property to be used for newspaper dispensing racks or commercial handbill boxes. The First Amendment is not abridged by regulations prohibiting the placement of vending machines on public sidewalks, whether the publications involved constitute commercial speech or some other, more highly protected kind of expression.

It is well-settled that a state or local government, "no less than a private owner of property, has power

to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). It is likewise beyond dispute that the First Amendment does not guarantee the right to communicate one's views at all times and places or in every manner that one desires. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988); *id.* at 773 (White, J., dissenting); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Adderley*, 385 U.S. at 47-48. As necessary corollaries, the First Amendment "does not mean that one can . . . distribute where, when and how one chooses," *Breard v. Alexandria*, 341 U.S. 622, 642 (1951), and "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981); *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (plurality opinion).

This Court's decisions thus support the view that state and local governments are free, consistent with the First Amendment, to prohibit the placement of dispensing boxes and racks on public property. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490, 508, 512 (plurality opinion); *id.* at 553 (Stevens, J., dissenting in part); 568 (Burger, C.J., dissenting); 570 (Rehnquist, J., dissenting); *City of Lakewood supra.* This Court has long recognized that state and local governments may legitimately exercise their police powers to prohibit certain methods of communication on public or private property. For example, the Court has found that preserving public property for its intended use, improving the aesthetic environment, and enhancing pedestrian and motorist safety are all substantial governmental interests,

which can justify regulations prohibiting the use of sound trucks, political advertising on public buses, certain outdoor billboards, and signs posted on government property to convey messages. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77 (1949); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303 (1974); *Metromedia, Inc. v. San Diego, supra*; *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

The opinions in *City of Lakewood* strongly imply that a total ban on sidewalk devices dispensing commercial speech does not violate the First Amendment. Three Justices in that case, in the context of a dispute involving *newspaper* vending machines, expressly stated that "our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional . . . ." 486 U.S. at 773 (White, J., joined by Stevens and O'Connor, JJ., dissenting). Justice Brennan, and the three Justices who joined his opinion for the Court, said nothing to the contrary. Rather, they ruled that the lower court's approval of an "absolute ban on residential newsrack placement" was not formally before the Court, and they expressly reserved the issue of whether a city "may constitutionally prohibit the placement of newsracks on public property." *Id.* at 755 n.4, 762 n.7.

If Cincinnati can constitutionally ban from public property boxes and racks distributing all kinds of speech, the only question remaining is whether Cincinnati can take the more limited step of banning such devices for "commercial handbills." To put the matter another way, the question is whether Cincinnati, by permitting newspapers to be distributed through sidewalk vending machines, has somehow disabled itself from banning the distribution of commercial advertisements on public property. In our view, for the reasons to which we now turn, the City has imposed no such disability on itself.

II.

This Court has frequently recognized a distinction between commercial and noncommercial speech in evaluating challenges to state or local regulations. It has also repeatedly held that the degree of First Amendment protection afforded speech depends upon whether the speech is commercial or noncommercial. Commercial speech is entitled to a lesser degree of First Amendment protection than noncommercial speech. *See, e.g., Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

Under this Court's precedents, a state or local government can regulate commercial and noncommercial speech differently without abridging First Amendment protections. The court of appeals reached the contrary conclusion only by misreading this Court's commercial speech decisions.

First, the court of appeals misapprehended one of the fundamental principles established in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981). The court admitted that Cincinnati's "commercial handbill" regulation would be constitutional if a majority of the Court in *Metromedia* had upheld San Diego's regulation of billboards as a permissible regulation of commercial speech. But a majority of the Justices in

Metromedia did just that. Seven Justices found no First Amendment infirmity in a regulation that banned all commercial speech on billboards. *Id.* at 508, 512 (plurality opinion); 553 (Stevens, J., dissenting in part); 568 (Burger, C.J., dissenting); and 570 (Rehnquist, J., dissenting). For this reason alone, the court of appeals' decision should not stand.

Second, despite this Court's clear statements on the issue, the court of appeals, without citation to any authority, determined that commercial and noncommercial speech are entitled to the same First Amendment protection in this case because:

> the lesser value placed on commercial speech only justifies regulations dealing with the content of the speech itself, or with distinctive effects that the content of the speech will produce.

Pet. App. 10a. In other words, the court held that a regulation directed at the content of commercial speech receives less First Amendment protection than a regulation directed only at the manner in which commercial speech is distributed.

Third, the court of appeals ruled that a regulation limited to commercial speech cannot be "content-neutral." The court's discussion is incompatible with the way in which this Court has used the concept of content neutrality. This Court has never held or even suggested that distinguishing between commercial speech and noncommercial speech is not "content-neutral." Indeed, the Court has repeatedly recognized that very distinction and created separate approaches for dealing with commercial speech and noncommercial speech. In the context of commercial speech, a regulation is content-neutral if, like the Cincinnati ordinance at issue here, it applies in the same manner

regardless of the substantive content of the commercial message.

Fourth, notwithstanding this Court's statements that it has "been loath to second-guess the Government's judgment" and that it "leave[s] it to governmental decisionmakers to judge what manner of regulation may best be employed," *Fox*, 492 U.S. at 478, 480, the court of appeals bluntly asserted: "[w]e do not believe that these statements command us to give the city the benefit of the doubt in close cases." Pet. App. 9a-10a n.8. Having decided that no deference is due the City's ordinance, the court of appeals improperly rebalanced the interests involved to achieve a closer fit between the substantial government interest and the means chosen to advance that interest. This was error. Where, as here, there is no dispute that the governmental interests underlying the regulation are legitimate and substantial, this Court does not adjust the "fit" based upon its reevaluation of the ends and means involved. *Fox*, 492 U.S. at 480.

ARGUMENT

I. THIS COURT'S DECISIONS RECOGNIZE THE POWER OF LOCAL GOVERNMENTS TO REGULATE OR EVEN PROHIBIT THE PLACEMENT OF NEWSPAPER VENDING MACHINES ON PUBLIC PROPERTY

A. State And Local Governments Have Well-Established Power To Preserve Public Property For Its Lawfully Dedicated Use And To Regulate The Use Of Such Property To Advance Substantial Safety And Aesthetic Interests

It is well-settled that a state or local government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Here, respondents assert a right to set aside the property rights of the City of Cincinnati and to permanently occupy a portion of the city sidewalks to distribute their commercial publications through metal or plastic dispensing devices. Respondents rely exclusively on the First Amendment.

The decisions of this Court establish that state and local governments may legitimately exercise their police powers to preserve or improve their aesthetic environments and to provide for the safety of their residents. For example, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court held that the power of state and local governments to take actions to preserve or improve their aesthetic environments may often override certain interests that implicate the First Amendment.

> In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure

> to certain methods of expression which may legitimately be deemed a public nuisance. In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held that the State had a substantial interest in protecting its citizens from unwelcome noise. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld the City's prohibition of political advertising on its buses, stating that the City was entitled to protect unwilling viewers against intrusive advertising that may interfere with the City's goal of making its buses "rapid, convenient, pleasant, and inexpensive," *id.*, at 302-303 (plurality opinion). *See also id.*, at 307 (Douglas, J., concurring in judgment); *Erznoznik v. City of Jacksonville*, 422 U.S. [205,] 209, and n.5 [(1975)]. *These cases indicate that the municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.*
>
> *Taxpayers for Vincent*, 466 U.S. at 805-806 (emphasis added) (footnote omitted).

Similarly, this Court has recognized that safety interests may often override certain interests that implicate the First Amendment. In *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 493 (1981) (plurality opinion), this Court considered a billboard ordinance designed "to eliminate hazards to pedestrians and motorists brought about by distracting sign displays" and "to preserve and improve the appearance of the City." A majority of the Court concluded that a city's safety and aesthetic interests are sufficiently substantial to justify a content-neutral prohibition against the use of billboards. *See id.* at 507-508 (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). Five

Justices expressly found the interest in safety adequate to support such a ban, and seven Justices found "the City's interest in avoiding visual clutter" a sufficient justification. *See Metromedia*, 453 U.S. at 507-508 (plurality opinion); *id.* at 560-561 (Burger, C.J., dissenting); *Taxpayers for Vincent*, 466 U.S. at 806-807 (citations omitted).

In this case, it is undisputed that Cincinnati regulates the use of dispensing devices on public property in order to advance substantial aesthetic and safety interests. Although the City chose *not* to ban all newspaper vending machines from public sidewalks, its legitimate interests were more than adequate to justify such a total ban.

B. The First Amendment Does Not Create A Right To Distribute Commercial Handbills Through Boxes Or Racks Placed On Public Property

The First Amendment "does not mean that one can talk or distribute where, when and how one chooses." *Breard v. Alexandria*, 341 U.S. 622, 642 (1951). Important rights other than those of the First Amendment are involved in this case, and only by adjusting those rights can the community enjoy "both full liberty of expression and an orderly life." *Id.*

Moreover, as this Court has recognized, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981). *See also United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (plurality opinion) ("the government's ownership of property does not automatically open that property to the public"). Similarly, there is no

right to assistance from state and local governments in distributing commercial or noncommercial speech. *See Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983) (rejecting "notion that First Amendment rights are not somehow fully realized unless they are subsidized by the State").

When these well-established principles are applied to respondents' challenge to the Cincinnati commercial handbill regulation, it is clear that respondents have no First Amendment right to distribute their advertisements through boxes or racks placed on public property. To recognize such a right would force state and local governments to assist in the communication of commercial speech by making public property available as distribution centers. This the First Amendment does not require. *See Pell v. Procunier*, 417 U.S. 817, 833-834 (1974).

This Court's decisions in *Metromedia* and *City of Lakewood* confirm that state and local governments do not run afoul of the First Amendment if they act to limit or even prohibit dispensing boxes and racks on public property. In *Metromedia*, the plurality stated that a city regulation allowing on-site billboard advertising, but banning off-site billboard advertising (subject to certain narrow exceptions), was constitutional "insofar as it regulates commercial speech . . . ." 453 U.S. at 512 (White, J., joined by Stewart, Marshall, and Powell, JJ.). The plurality suggested that a total prohibition of billboard commercial speech, whether on-site or off-site, also would be constitutionally permissible.

> If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city

> has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends . . . .

Id. at 508.

Other members of the Court also expressed the view that a total ban on a particular manner of communicating commercial speech would be constitutional. Justice Stevens stated that "a wholly impartial total ban on billboards would be permissible." *Id.* at 553 (Stevens, J., dissenting in part). Justice Rehnquist said that "the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community." *Id.* at 570 (Rehnquist, J., dissenting). Chief Justice Burger likewise left little doubt that in his view a city could ban billboards altogether. *Id.* at 567-68.

Taken together, the various opinions in *Metromedia* show that a total ban on billboards, including both commercial and noncommercial billboards, would be consistent with the First Amendment. The kind of total ban discussed in the *Metromedia* opinion would have applied, of course, to billboards on both public *and* private property. In this respect, the regulation would have been more far-reaching than the Cincinnati ordinance at issue here, which applies only to the public sidewalks. As we explain in greater detail below, the *Metromedia* opinions also would support a more limited ban, applying only to billboards with commercial speech.

City of Lakewood is to the same effect. The local ordinance at issue there originally banned the private placement of any structure on public property. The ordinance was subsequently amended to permit the mayor broad discretion in deciding whether and where to allow newspaper vending machines on such property. Although the Court held the amended ordinance invalid because of the amount of discretion it gave to the mayor, no Justice suggested that a total ban on newspaper vending machines and newsracks would violate the First Amendment.

The four Justices joining the Court's opinion noted that the lower court's approval of an "absolute ban on residential newsrack placement" was not before the Court, and they did not "pass on" whether a city "may constitutionally prohibit the placement of newsracks on public property." *City of Lakewood*, 486 U.S. at 755 n.4, 762 n.7. The three dissenting Justices expressly stated that "our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternative means of 24-hour distribution of newspapers exist." *Id.* at 773.

Thus, *Metromedia* and *City of Lakewood* support the conclusion that state and local governments are free to prohibit dispensing boxes and racks on public property without violating the First Amendment. The only remaining question is whether the First Amendment nevertheless precludes a city from taking the lesser step of banning such boxes for commercial handbills.

II. COMMERCIAL AND NONCOMMERCIAL SPEECH DO NOT HAVE EQUAL FIRST AMENDMENT VALUE AND ARE NOT ENTITLED TO EQUAL FIRST AMENDMENT PROTECTION

A. This Court Has Repeatedly Stated That Commercial Speech Enjoys Less First Amendment Protection Than Noncommercial Speech

This Court has repeatedly recognized a distinction, for First Amendment purposes, between commercial and noncommercial speech. *Fox*, 492 U.S. at 473-474; *Posadas de Puerto Rico v. Tourism Company of*

Puerto Rico, 478 U.S. 328, 340 (1986); *Bolger*, 463 U.S. at 64-65. Commercial speech is entitled to a lesser degree of First Amendment protection than noncommercial speech. As the Court said in *Fox*:

> Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression."

Fox, 492 U.S. at 477 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)) (brackets in original). Similarly, this Court in *Zauderer* emphasized that, while "commercial speech" is entitled to First Amendment protection, the protection is "somewhat less extensive than that afforded 'noncommercial speech.'" 471 U.S. at 637 (citations omitted).

The Court has identified several reasons for its consistent distinction between commercial and noncommercial speech. First, commercial speech generally makes a different contribution to the exposition of ideas. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). It is not at the core of what the First Amendment seeks to protect. Second, commercial speech tends to be more durable and robust than other kinds of speech. Because the commercial speaker has an economic self-interest in dissemination, there is little likelihood of the speech being chilled by regulation. *Id.* at 564 n. 6; *Bates v. State Bar*, 433 U.S. 350, 381 (1977). Third, commercial speakers normally have extensive knowledge of their products, services, and markets. They are particularly well situated to ensure the accuracy of

their speech and to comply with reasonable regulation. *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976). Finally, there is an inherent danger that affording equal First Amendment protection to commercial and noncommercial speech would erode the First Amendment protection of noncommercial speech. As this Court wrote in *Ohralik*,

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

436 U.S. at 456.

The court of appeals' approach to Cincinnati's "commercial handbill" ordinance departs significantly from this Court's decisions. Rather than accepting the well-established distinction between commercial and noncommercial speech, the court created two categories of commercial speech under the First Amendment, where only one category had existed before. The first category is commercial speech regulated because of the commerce it is promoting or the "distinctive effects" that that commerce could be expected to produce. Pet. App. 2a, 10a. Such commercial speech, in the court of appeals' view, has a "lesser value" and is entitled to less extensive First Amendment protection—even though, by hypothesis, the regulation concerns the content of the speech. The second category involves commercial speech regulated for different reasons, *e.g.*, because of the manner in which the speech is distributed. The court of appeals would afford commercial speech in this category protection coextensive with that given to noncommercial speech,

notwithstanding the conflict between that approach and this Court's decisions. Pet. App. 13a.

The court of appeals' analysis is squarely undercut by the views expressed in *Metromedia*. As noted above, a clear majority of the Justices in *Metromedia* concluded that a ban on a manner of transmitting commercial speech (in that case, via billboards) was constitutional when supported by substantial governmental interests such as aesthetics and safety.

The court of appeals' approach turns this Court's First Amendment principles upside down. Under the Sixth Circuit's analysis, a regulation directed at the *content* of commercial speech is more likely to be sustained than a content-neutral regulation directed at the *manner* in which the commercial speech is distributed. As this Court explicitly stated in *Central Hudson*, however, while the First Amendment prohibits regulation based on content in most areas, content-based restrictions are permissible in regulating commercial speech. *Central Hudson*, 447 U.S. at 564 n.6.

The court of appeals' improper classification of commercial speech into different categories led the court to the erroneous conclusion that the City's decision to permit newspaper vending machines precludes Cincinnati from banning sidewalk dispensers for commercial handbills. Contrary to the court of appeals' view, however, Cincinnati is not required to prohibit newspaper vending machines as a precondition of prohibiting the distribution of commercial speech through boxes or racks placed on public property.

The First Amendment does not require a state or local government to choose between curing all of its aesthetic or safety problems or not addressing any of those problems at all. *See Taxpayers for Vincent*, 466 U.S. at 810-811; *Metromedia*, 453 U.S. at 511-512 (plurality decision).

B. Deference Is Due A Legislative Decision Concerning The Appropriate Scope Of Commercial Speech Regulations

Cincinnati could properly decide that, given the number of newspaper vending machines already permitted on the city sidewalks, it would not also allow commercial handbill dispensers to clutter the public right-of-way. The City has a legitimate concern that if dispensers of the kind used by respondents are allowed to remain in place they will soon proliferate to the point where they will cause major adverse effects on the City's appearance and on the free and safe flow of pedestrian and vehicular traffic. By ascribing significance to the fifteen hundred existing newspaper vending machines in comparison to respondents' sixty-two handbill dispensers, the court of appeals improperly refused to credit the City's reasons for its action. The court wrongly second-guessed the governmental officials charged with the responsibility for supervising Cincinnati's public property, and it ignored the obvious fact that respondents are only two of a virtually unlimited number of potential publishers of commercial handbills.

The court of appeals, in other words, improperly rebalanced the interests at stake and refused to "give the city the benefit of the doubt in close cases . . . ." Pet. App. 9a-10a n.8. The Sixth Circuit's approach is contrary to the deference this Court has shown for

legislative judgment calls concerning the appropriate scope of commercial speech regulation. This is particularly so in light of the absence of any showing in this case that respondents do not have ample alternative channels for the distribution of their commercial speech.

As this Court explained in *Fox*, the "reasonable fit" requirement does not call upon courts to conduct any rebalancing to achieve a tighter fit between the substantial governmental interest underlying the regulation and the means selected to achieve the goal.

> What our decisions require is a " 'fit' between the legislature's end and the means chosen to accomplish those ends," *Posadas*, 478 U.S., at 341—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," *In re R.M.J.*, [455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

492 U.S. at 480. This Court's application of the "reasonable fit" element of the *Central Hudson/Fox* test makes it clear that courts are not permitted to second-guess a legislative judgment. *Id.* at 478-479; *see also Posadas*, 478 U.S. at 344.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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